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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1957

No. [redacted] 73

CHARLES PADRON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles Padron, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS OF THE COURTS BELOW

The judgment and sentence of the United States District Court for the Southern District of Texas, Laredo Division, was entered on the 15th day of March, 1957. The District Court's judgment is not reported, but is printed in the Record filed herewith. In the course of the trial, the district judge wrote an unreported opinion upon an aspect of the case as to which review was not sought.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the trial court, was filed on April 29, 1958. The opinion is not yet reported, but is set out in full in the Appendix hereto at pages 15-20.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1958. This Petition for Certiorari was filed within thirty days of the entry of that judgment.

The jurisdiction of this Court is invoked pursuant to Sec. 1254 (1) Title 28, U.S. Code, and Rule 19 (b) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Was it not error for the trial court to grant petitioner's pre-trial motion for severance from a co-defendant, and then, in a hearing kept secret from petitioner, which occurred after the trial commenced and evidence was adduced, to put the previously severed co-defendant upon trial before the court at the same time petitioner was standing trial before the jury?

2. Was it not error for the government knowingly to conduct a spurious prosecution of a sham defendant, whose only function was to testify against her co-defendant?

STATUTES INVOLVED

The conviction herein took place under the provisions of Section 371, Title 18, U. S. Code, and Section 545, Title 18, U. S. Code.

The constitutional provisions involved in this petition are amendments 5 and 6, to the Constitution of the United States.

The relevant portions of the statutes and constitutional amendments are set forth in Appendix B hereof.

STATEMENT OF THE CASE

The petitioner and three co-defendants were indicted together in seven counts. The first count charged a conspiracy in violation of Section 371, Title 18, U.S. Code, whose objects were to violate Section 545, Title 18, U.S. Code, relating to smuggling and dealing with two quantities of unlawfully imported marijuana, and to violate Sections 4724 (a) and 4744 (a) of Title 26, U.S. Code, relating to acquisition and transfer of marijuana. Counts 2, 4, and 5 charged substantive violations of the said Section 545, Title 18, U.S. Code, (smuggling, etc.) as to the same subject matter referred to in the conspiracy count. Counts 3, 6, and 7, referring to the same subject matter, charging further substantive violations, were dismissed by the trial judge. The jury found petitioner guilty as charged in Counts 1, 2, 4, and 5. The court sentenced petitioner to be imprisoned to consecutive and concurrent terms totalling ten years.

Of petitioner's co-defendants, one Mills Ortiz plead guilty prior to trial and became the primary government witness against him. The others, one Gloria Chavez, and one Emilio Chavez, were, or had been married. Petitioner moved for a severance from Gloria Chavez (R. 10-18) which was granted by the trial judge (R. 50). On March 11, 1957, petitioner went to trial before a jury with his co-defendant Emilio Chavez (R. 51). On the afternoon of March 12, 1957, petitioner discovered that Gloria Chavez had become a defendant in a simultaneous proceeding to be heard by the court sitting without a jury while petitioner's case was being tried to the jury (R. 227). Her inclusion as a defendant at that time followed a hearing out of petitioner's presence, and of which he had been given no notice, which hearing culminated in an order which purported to put the previously sev-

ered co-defendant, Gloria Chavez, on trial in the midst of petitioner's trial (R. 227). Petitioner first learned of the tandem proceedings when he moved for a mistrial on the ground that the severed co-defendant's attorneys were improperly participating in his trial (R. 227).

Having become a defendant in a case then on trial, the previously severed co-defendant immediately became a government witness in the case in which petitioner was standing trial, and presumably in the case against herself (R. 230). The peculiarity of that situation was made the subject of a further Motion for mistrial which was similarly overruled (R. 230).

The evidence adduced by the government tended to show that petitioner purchased a Buick automobile in Chicago for Ortiz with the understanding that Ortiz would use it to smuggle marijuana for petitioner from Mexico; that Ortiz, and Emilio Chavez driving a second car in caravan, went to Mexico; that petitioner sent money to Chavez in Mexico City; that Ortiz and Chavez purchased marijuana, hid it in Chavez' Studebaker and Ortiz' Buick; that Chavez successfully crossed the border and parked the Studebaker in Laredo, Texas; that Ortiz was captured at the border with marijuana. Chavez was arrested some months thereafter. Defendant Gloria Chavez, according to the government's evidence, accompanied her husband or former husband from Chicago to Mexico City to see their children in Mexico City. She was returning to Chicago with Chavez when Ortiz' arrest interrupted the journey.

Chavez testified that the money he received from petitioner Padron while in Mexico was owed to him by petitioner for carpentry done in Chicago. He denied he acquired any marijuana in Mexico. He claimed his brother

accompanied him from Mexico City to Nuevo Laredo, Mexico. He denied driving into Texas, and created the inference that his brother transported the Studebaker into Texas.

Petitioner Padron testified that Ortiz occupied an apartment in a building managed by petitioner's wife in Chicago; that he accompanied Ortiz to a used car lot to assist him in the purchase of the Buick, required by Ortiz' ignorance of the English language; that the money he sent to Chavez in Mexico was in payment of carpentry work performed for him by Chavez in Chicago. Petitioner denied any complicity in the commission of the offenses alleged in the indictment. He admitted a previous federal conviction of an offense relating to marijuana.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The trial judge erred in vitiating his pre-trial order granting defendant's Motion for severance, by holding a hearing in the course of trial kept secret from the defendant, in which he entered an order putting the previously severed co-defendant on trial before the court while petitioner stood trial before the jury; erred in conducting a joint and several trial, and in conducting simultaneous multiple trials of severed but joint co-defendants, and erred in thus depriving petitioner of certain of his constitutional rights. The Court of Appeals erred in sanctioning the procedure followed in the trial court.

Rule 19 of the Rules of this Court in setting out the considerations governing review in certiorari, discloses that the reasons which this Court will consider in granting certiorari include the situation where a Court of Appeals has so far departed from the usual and accepted course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The matters of which we complain herein are largely addressed to this aspect of your Honors' discretion. The rights of petitioner adversely affected by the procedure complained of include his right to be present at all stages of the proceedings against him, his right to notice and an opportunity to be heard, and his right to effective assistance of counsel.

The chronology bearing upon petitioner's eventual joint and several trial may be helpful to this Court.

1. Indictment filed January 14, 1957, charging Ortiz, Gloria Chavez, Emilio Chavez, and petitioner Padron (R. 4).

2. Plea of guilty by Ortiz, February 8, 1957 (R. 195).

3. Padron's motion for severance from Gloria Chavez, filed (R. 10) and *granted* March 11, 1957 (R. 50).

4. Commencement of government's case as to Padron and Emilio Chavez on March 11, 1957 (R. 50).

5. Continuation of government's evidence on March 12, 1957 (R. 118) and recess at end of morning session *until 2:00 o'clock* (R. 199).

6. Continuation of government's evidence at afternoon session, March 12 (R. 200).

7. Gloria Chavez' attorney's participation in trial (R. 208-209) and Court's offer to permit her to cross examine government witness (R. 209) precipitating Padron's motion for mistrial.

8. Padron's motion for mistrial denied, with explanation by the trial judge that since 2:00 p.m. Gloria Chavez had been on trial before the court and Padron before the jury simultaneously, as a consequence of proceedings *at 1:45 P.M.* on March 12, out of Padron's presence and without notice to him (R. 227-228).

9. Gloria Chavez called as government witness (R. 229) and petitioner Padron's motion for mistrial predicated thereon (R. 230).

10. Court's statement in the presence of the jury: (a) that Gloria Chavez *was* on trial (R. 262); and (b) that she was *not* on trial (R. 379).

In brief, the foregoing demonstrates that petitioner Padron was granted a severance from his co-defendant Gloria Chavez prior to trial; that he went to trial supposing that he had been granted a severance as that term is ordinarily understood. After the main burden of the government's case was in, he discovered that in a secret proceeding the trial judge and the government, abetted by Gloria Chavez' attorneys, had contrived to get her back into the proceedings as his co-defendant.

In its opinion (Appendix A) the Court of Appeals acknowledged that the foregoing was indeed the "arrangement". That court then reduced the question to one of whether or not we delineated specific prejudice ensuing from the resulting joint trial, decided we did not, and accordingly affirmed. In so affirming, that court has established as precedent the following rules:

COURT OF APPEALS RULE A.

Where a trial is procedurally defective the reviewing court may cast upon the defendant the burden of demonstrating to the appellate tribunal that the jury's verdict was in fact affected by the procedure adopted, notwithstanding the procedural irregularity may have amounted to a deprivation of due process of law.

COURT OF APPEALS RULE B.

That although a severance be granted prior to trial, the trial court may, in *ex parte* proceedings, without notice to the defendant or his attorney, and without giving them an opportunity to be heard, add the previously severed co-defendant as a party on trial, notifying the defendant of the result of the secret proceedings after further evidence has been adduced.

COURT OF APPEALS RULE C.

That the number of trials which may be conducted simultaneously before the same tribunal is governed by the size of the courtroom.

* * * * *

In view of the constitutional deprivations here complained of, it is improper that petitioner should have been burdened in the Court of Appeals with the task of showing exactly wherein the jury was deflected. *United States* v. *Denno*, 2 Cir., 221 F. 2d 626, 628 (1955). The trial judge granted a severance to petitioner, then effectively revoked the severance in a secret nullifying order.

We respectfully urge upon this Court the view that it is shocking, unconscionable, and in violation of the dictates of fair procedure to permit secret proceedings to occur in the course of a criminal trial when not only the defendant, but also his counsel is absent. Further, neither the defendant nor his attorney were even notified of the pendency of proceedings affective of the rights granted him as a result of his motion for a severance. The secrecy of the proceedings, precluded the participation therein of petitioner's attorney.

Petitioner was thereby deprived of:

a. His right to be present or represented at all stages of the trial proceedings affective of his rights, as guaranteed by the due process clause of the Fifth Amendment. *Shields* v. *United States*, 273 U.S. 583, 588 (1927); *Arrington* v. *Robertson*, 3 Cir., 114 F. 2d 821, 823 (1940).

b. His right to notice and opportunity to be heard, as guaranteed by the due process clause of the Fifth Amendment. *L. B. Wilson* v. *Federal Communications Commission*, D.C. Cir., 170 F. 2d 793, 802 (1948).

c. His right to the effective assistance of counsel, as guaranteed by the Sixth Amendment. *Glasser* v. *United States*, 315 U.S. 60, 70 (1942).

By his order granting petitioner a severance, the trial judge adjudicated that petitioner could not receive a fair trial if exposed to the jury concurrently with Gloria Chavez. The trial court never retreated from that position. In its belated disclosure of its subsequent order of joinder, the court reaffirmed its previously expressed view (R. 227-228). But the *ex parte* order subjected the petitioner to a joint and several trial with his "severed" co-defendant. The result was that the trial judge did by indirection, what the trial judge maintained throughout should not be done directly were petitioner to be fairly tried. But however unfair it would have been to deny petitioner's original motion for severance, it would have been infinitely preferable to the procedure adopted. Petitioner was thus encouraged to adopt a trial strategy predicated upon Gloria's severance from him. When the defense became irrevocably committed to the strategy thus devised, Gloria was reintroduced as a defendant.

The departure herein from the accepted and usual course of judicial proceedings was as novel as it was stunning. We find no authority for or against the proposition that one tribunal can conduct more than one trial at one time.

Petitioner was granted a severance, only to discover that he was to be tried "separately" from a defendant with whom he was to be tried jointly. Gloria Chavez on the other hand, was granted a joinder, in order that she and petitioner might be tried separately. We know of no other case in which joint trials have been tried separately, or separate trials have been tried jointly, whichever way it was that the case below was tried.

But the Court of Appeals has now sanctioned such Siamese trials (Appendix A).

As it happened, Padron was tried by the jury, whilst the judge presiding, himself was the trier of fact as to Gloria Chavez. The Court of Appeals opinion leaves the door wide open to a further streamlining of the art of trying defendants separately. It now being determined that two triers of fact may conduct joint and several trials, nothing deters a trial in which additional triers of fact are not the presiding judge, but additional juries—*n* defendants, *n* juries.

A querulous defendant's unreasonable demands for a severance may now be satisfied without the inconvenience of multiple trials. Nor may the carping critic complain that the *purpose* of granting a severance is to grant multiple trials. For in the case before your Honors, procedure has been Modernized, Streamlined, and Made Scientific.

Efficiency reigns.

II.

The court erred in permitting the government to conduct a joint prosecution of petitioner and a sham co-defendant intended only to be used by the government as a witness against petitioner.

As noted by the Court of Appeals, in petitioner's motion for severance, he averred, among other things, that Gloria Chavez, though named as a defendant, was in fact but a government witness (R. 11) and would only occupy a nominal role as a defendant on trial (R. 12; Appendix A).

He was granted a severance, later reduced to a quasi or pseudo severance when Gloria Chavez was re-introduced into the trial (R. 227).

When Gloria Chavez was placed on trial, the only evidence remotely connecting her to any offense alleged in the indictment had already been introduced (R. 75-225). Government evidence following her testimony did not tend in the least to demonstrate her complicity in the offenses charged. Yet there was no stipulation that evidence given previous to her testimony should be applicable to her. Had it been the government's intention to conduct a *bona fide* prosecution of Gloria, some such arrangement would have been necessary.

We submit that the only tenable conclusion is that Gloria Chavez was a counterfeit defendant. The government did not intend to prosecute her as a defendant. What the government intended was that her nominal status as a defendant should render her testimony more damaging. Inevitably, and in consequence of this arrangement she was found not guilty by the court (R. 601).

That Gloria testified in the role of a defendant, lends justification to the fears expressed by Padron in his motion for a severance that it would appear to the jury that both the prosecution and the defense were agreed that the defendants on trial before the jury were guilty (See Paragraph 9 of the Motion for Severance, R. 14). The airing of domestic differences between Gloria and her co-defendant husband or former husband was immaterial, inflammatory, and highly prejudicial (R. 230-267).

We are unable to present authority in support of the proposition that the government may not conduct sportive prosecutions of sham defendants when the government's *sub rosa* purpose is to use the latter as witnesses against genuine defendants faced with the genuine possibility of loss of their liberty.

We can only refer to the *caveat* contained in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), admonishing prosecutors that while they may strike hard blows, their blows may not be unfair.

CONCLUSION.

Because of the unacceptable and unusual departure from the ordinary course of judicial proceedings which occurred in the trial court, and was sanctioned by the Court of Appeals, we respectfully urge that this case calls for the exercise of this Court's power of supervision. The opinion of the Court of Appeals, about to be broadcast into the reports, lends itself all too readily to further abuse of the judicial process. We do not predict that every federal criminal prosecution will suddenly burgeon forth with sham defendants, cabalistic hearings, and joint and several multiple-single trials. But unless this Court grants certiorari herein, and reverses the judgment of the Court of Appeals, the opinion in the court below will be authority in support of such practices wherever they occur.

Respectfully submitted,

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APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16591

CHARLES PADRON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(April 29, 1958.)

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: Tried with others on an indictment charging in count one a conspiracy in regard to marihuana, in violation of Sec. 371, Title 18 U.S.C., and in the other counts substantive violations of the customs, and other laws in regard to marihuana, and convicted on the conspiracy count and on substantive counts two, four, and five, charging violations of Sec. 545, Title 18, U.S.C., defendant was sentenced to five years on count one and five years on counts 2, 4 and 5, this sentence to be served consecutively with the sentence on count one, making a total of ten years to serve.

Here, complaining in a well prepared and argued brief of the judgment entered on the verdict, defendant, puting forward six specifications of error and arguing each with clarity, brevity and vigor, urges upon us that the judgment may not stand.

On its part appellee, answering each specification in turn, opposes them all as without merit, indeed without substance.

For the reasons hereafter stated as to each, we are of the opinion that none of the specifications presents prejudicial and reversible error and that the judgment should be affirmed.

In support of his first specification of error:

> "In causing Padron to stand trial with Gloria Chavez after having granted Padron's motion for the severance from her, all to Padron's prejudice and to the confusion of the jury as to whom it was trying."

appellant points to the grounds stated in his motion for severance, which motion was sustained by the court, to-wit: that there were conflicts of interest between him and Gloria, that she actually intended to be a government witness under the guise of a plea of not guilty; and that there was animosity between her and her husband, Emilo Chavez, another of Padron's co-defendants. Insisting that he was deprived of the benefits of the order granting his motion for severance when the court made an arrangement with her counsel, which was not known to Padron's counsel until later in the trial when he moved for a mistrial, that Gloria would be tried by the court at the same time that Padron was being tried by the jury, he urges upon us that his motion for a mistrial made on this ground should have been granted.

If we could agree with appellant that the procedure adopted by the court resulted in prejudicing appellant's defense, we should, of course, agree that his motion for mistrial should have been granted. A careful study of appellant's brief, however, with a search of the record fails to show any prejudice to appellant from the pro-

cedure adopted by the court. We agree with the conclusion of the district judge when, in denying the motion for mistrial, he stated: "I do not think any harm has come from Mr. Hall's (Gloria Chavez's attorney) participation here, and he has only asked one question, I believe, and made one or two objections. I overrule the motion."

We think appellant stands no better in respect of his specification of error No. 2:

> "The court erred in declining to grant defendant's motion to produce the notes of Customs Inspector Latimer."

This claim of error, purportedly based on *Montgomery* v. *United States*, 203 F(2) 887; *Indiviglio* v. *United States*, 249 F(2) 549, and *Jencks* v. *United States*, 353 U.S. 657, is not, we think, made out on the record.[1]

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[1] The matter arose and proceeded thus: While Inspector Latimer was on the stand, he was asked for the number of the Studebaker car that he seized. Thereupon the court inquiring, "Do you have any notation anywhere of those numbers, Mr. Latimer?", and Latimer answering, "Only in the case report." which he had made up, the court asked, "Can you refresh your recollection from the report and give us the license number?" and answering, "Yes, Sir", the witness, having refreshed his memory, gave the number as Illinois License No. 1570573. No objection was made to the witness thus refreshing his memory.

On cross-examination, however, this occurred. Counsel for appellant asked the witness, "Well in this case, aren't you charged with the responsibility of getting the evidence together and getting the witnesses together and investigating it? Don't you have a primary responsibility in this respect?" and the witness answered, "I suppose so, Sir." Counsel then asked, "Let me see Mr. Latimer's notes, if you please." and the United States Attorney objecting, the witness stated "This is the official file. It is the report of progress to the United States Attorney. It is not an official communication, not my notes.".

Thereupon, Mr. Oliver stating, "That is what you used to refresh your recollection?" the court interpolating, "On that license number?" and the witness answering, "Yes, Sir", Oliver again asked to see the notes and the court sustained the objection.

It seems clear to us as it did to the district judge, that his ruling was not erroneous. Moreover, if there was error, it was entirely harmless as there was no dispute about the number or the identification of the seized car.

In arguing his specification No. 3:

> "There was a total lack of evidence as to appellant as to counts 4 and 5 of the indictment."

appellant meets the insurmountable difficulty, that if the theory of the government testified to directly by some of its witnesses and bulwarked by circumstances in support, was accepted by the jury, as it evidently was, there was abundant evidence to support the verdict on these counts. We think the appellant argues the case in too great disregard of the pattern made by the direct and circumstantial evidence which, if believed, ties the happenings and events together into a seamless web and points inescapably to the conclusion that the trial of the serpent, in this case Padron, as the money man and master mind, was over it all.

Specification of Error No. 4:

> "The court erroneously permitted the government to inquire of the appellant as to other alleged offenses."

is, we think, based upon a misconception both of fact and of law. The misconception of fact is that the inquiry was made for the purpose of establishing possession by appellant of marihuana as an independent fact, whereas the purpose of the inquiry was merely to show that the felony offense, of which on his direct examination he had admitted he had been convicted, was an offense concerning marihuana. The misconception of law is that inquiry on cross-examination, as to whether he had been convicted of such an offense, was not permissible. In addition, when the record concerning this matter is considered and understood, no possible prejudice could have resulted from it since the matter began with defendant's own testimony

on direct, that he had been convicted of a felony in the Federal Court in Illinois, and was concluded with the permissible answer which the district attorney had been seeking all along, that that conviction was for possession of marihuana, a similar offense to that for which he was on trial.

In support of his Fifth Specification:

> "The defendant was denied a fair trial by reason of the prejudicial and unfair conduct of the prosecutor."

defendant sets out brief extracts from the closing argument.

We think the record, which contains a full report of all the arguments as well as of the objections and rulings made in respect thereof, will not bear this out. *Cf. Uhl* v. *Echols Trans. Co.*, 238 F(2) 760. In the first place, the defendant did not think enough of the matters now made so much of to make objection to them while they were transpiring, except that in one case, where the court had already directed the prosecutor not to continue with the argument and the jury not to consider it, counsel belatedly joined in. In the second place, the district judge of his own motion kept watch and ward on the arguments to keep them within proper bounds and in every instance, of which complaint is now made, he directed the district attorney not to continue the argument, the jury not to take it into consideration. But over and above all of this, the arguments complained of are not subject to the attacks made upon them. Made in large part as a reply to the attacks of counsel for the defendant upon, and his belittling of the government's chief witness, they were to a large extent invited and to the extent, if any, that they went beyond this, they did not so transcend the bounds of legitimate argument as to constitute reversible error. Appellant's reliance here upon *Steele* v. *United States*, 222 F(2) 628 and *U.S.* v. *Tomaiolo*, 249 F(2) 683, will not at all do.

Of appellant's specification No. 6:

> "The court erroneously charged the jury that it might find the defendants guilty of conspiracy on the basis of a set of facts as to which there was no evidence."

it is sufficient to say that the objection, as required by the rules, does not make clear and specific the precise language of the charge objected to nor the specific reasons for the objection. Neither does the argument in the brief set out the precise language. On the contrary, it merely refers to the charge of the court on pages 577 to 579 of the Record. We do not find the objection made to the charge adequate to call the court's attention to the error claimed. If, however, the objection be considered sufficient, we do not find in the record any basis for the claim of error this specification asserts.

Finally, appellant quite ineffectually, we think, argues that if no particular error claimed is sufficient in itself to justify reversal, the body of the claims as a whole adds up to a continued and persistent invasion of his right to a fair trial, and, upon an overall view of the record as a whole, the case should be reversed and the cause remanded.

We cannot agree to this. On the contrary, we are of the opinion that the court painstakingly endeavored to and did conduct the trial intelligently, fairly, and impartially, and that such aberrations, if any, as there were from ordinary trial practice, and such imperfections, if any, as may have appeared, were on this record wholly insubstantial and without prejudice to defendant.

The judgment was right. It is AFFIRMED.

A true copy

Test: Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit

By Clara R. James

Deputy

New Orleans, Louisiana

APPENDIX B.

Constitutional Provisions Involved

The 5th Amendment to the Constitution of the United States provides in part that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The 6th Amendment to the Constitution of the United States provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

Statutes Involved

Section 371, Title 18, U. S. Code provides in part that:

> "If two or more persons conspire to commit any offense against the United States . . . each shall be fined . . . or imprisoned not more than five years . . ."

Section 545, Title 18, U. S. Code provides in part that:

> "Whoever knowingly and wilfully, with intent to defraud the United States smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced . . .,or
>
> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise . . .
>
> "Shall be fined . . . or imprisoned not more than five years . . ."